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No. 81-1472

In the Supreme Court of the United States

OCTOBER TERM, 1981

MERCK & CO., INC., PETITIONER

v.

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, AND UNITED STATES OF AMERICA

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, with respect to a negotiated government contract in which a fixed price was set on the basis of the commercial market price and without reference to incurred costs, the Comptroller General is authorized by 10 U.S.C. 2313(b) and 41 U.S.C. 254(c) to examine the contractor's records of its costs, where government payments under the contract are used to defray those costs.

2. Whether the Comptroller General's request for access to records pursuant to 10 U.S.C. 2313(b) and 41 U.S.C. 254(c) was invalid because of the purpose underlying the request.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a)[1] is reported at 665 F. 2d 1236. The opinion of the district court (Pet. App. 35a-40a) is reported at 529 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33a-34a) was entered on September 10, 1981. On December 4, 1981, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including January 8, 1982. On January 7, 1982 the government's petition for a writ of certiorari was filed in No. 81-1273. On February 5, 1982, the

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 81-1273. "C.A. App." refers to the joint appendix filed in the court of appeals.

conditional cross-petition for a writ of certiorari was filed pursuant to Rule 19.5 of the Rules of the Supreme Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The background of this proceeding is set forth in the government's petition for a writ of certiorari in No. 81-1273, at 3-7, and need not be repeated here. We note, however, that the dissenting opinion of Judge Mikva in the court of appeals concluded that the claims Merck presents in its cross-petition are "not new" (Pet. App. 9a) and "grossly overstate [the legislative] history, * * * and it is time to dispatch the contention once and for all" (*id.* at 10a).

ARGUMENT

Cross-petitioner urges (Pet. 2, 10) that the Court deny the government's petition for a writ of certiorari in *Bowsher* v. *Merck & Co.*, No. 81-1273 (filed Jan. 7, 1982), which presents the issue concerning GAO's access to cost records pursuant to the access-to-records provisions required by law. However, cross-petitioner does not contest that there is currently a conflict in the circuits on the construction of the access statutes or that a uniform interpretation of those statutes is important to the proper administration of the federal procurement system. For the reasons stated below and in the government's petition in No. 81-1273, we submit that the Court should decide that issue now and not postpone the resolution of the existing conflict.

In the alternative, cross-petitioner contends that if the Court grants the government's petition in No. 81-1273, it should also grant the instant conditional cross-petition for a writ of certiorari to consider two issues that are not involved in No. 81-1273 and do not present a conflict in the circuits. Cross-petitioner argues, first, that the access-to-records

provisions are inapplicable and afford no access whatever when neither the negotiation nor the performance of the contract related to the contractor's costs, and, second, that the Comptroller General's request for access was invalid because it was motivated by an improper purpose. The Court refused to consider these issues last Term in connection with *Staats* v. *Bristol Laboratories*, 451 U.S. 400 (1981) (see *Merck & Co.* v. *Staats*, 449 U.S. 1038 (1980); *SmithKline Corp.* v. *Staats*, 449 U.S. 1038 (1980)), and there is no greater reason to review them at this time. As we discuss below, cross-petitioner's arguments are without merit. Moreover, these arguments have been rejected by every court of appeals that has considered them. The cross-petition thus offers no reason to expand the carefully drawn issue presented in No. 81-1273 to include questions that have not divided the circuits and are not otherwise deserving of this Court's review. Accordingly, the conditional cross-petition should be denied.

1. Cross-petitioner contends that "none of Merck's cost records [came] within the scope of the access provision" because "all four of the contracts involved in this case are fixed-price rather than cost-based contracts" (Pet. 12). This construction of the access provisions is untenable and has been consistently rejected.

Cross-petitioner has pointed to nothing in the language of the statutes or their legislative history that would justify such a grudging interpretation of the access provisions. On the contrary, cross-petitioner's construction would defeat the congressional objective to guard against waste, extravagance and excessive pricing. Cross-petitioner's costs, even if neither directly the basis for the contract price nor the subject of discussions prior to execution of the contract, are nevertheless critical to an assessment of the advisability of continued adherence by the government to the negotiated procurement methods employed here. If cross-petitioner's

total costs are substantially lower than the prices paid by the government, the Comptroller General may recommend that the Department of Defense and the Veterans Administration adopt different procurement practices in the future. See *Hewlett-Packard Co.* v. *United States*, 385 F. 2d 1013, 1016 (9th Cir. 1967) ("[w]hile this appraisal could not affect these particular contracts, it could lead to the use of other methods of meeting future procurement needs"). And, as the court explained in *Eli Lilly & Co.* v. *Staats*, 574 F. 2d 904, 915 (7th Cir. 1978), the "argument that Congress could not have intended to inquire into wastefulness in contracts such as the one here in which drugs were supplied to the Government 'at a fixed price at or below the wholesale market price' * * * ignores the fact that the information sought by the Government may show that the prices it paid were nevertheless much too high."[2]

Furthermore, cross-petitioner's construction is at odds with the administrative interpretation adopted by GAO, which is entitled to deference and which Congress, although aware of the agency's position, has never disapproved.

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[2]This consideration is well illustrated by the testimony of GAO General Counsel Robert F. Keller before a congressional subcommittee:

> The catalog prices on Government orders [under sole source procurement for klystron tubes] frequently exceeded the company's current cost of production by more than 100 percent. * * *
>
> * * * * * *
>
> [T]he prices accepted by the General Services Administration and paid by the military services were substantially higher than seem reasonable in relation to the contractors' costs to manufacture and sell aircraft tires, and the Government experienced unnecessary costs in its procurement of these items * * * of approximately $10.7 million [in 1960] * * *.

Relation of Cost Data to Military Procurement: Hearings Before the Subcomm. for Special Investigations of the House Comm. on Armed Services, 88th Cong., 1st Sess. 7 (1963). See also pages 7-9, *infra*.

See *Relation of Cost Data to Military Procurement: Hearings Before the Subcomm. for Special Investigations of the House Comm. on Armed Services*, 88th Cong., 1st Sess. 3, 10-11, 23 (1963); *Comptroller General Reports to Congress on Audits of Defense Contracts: Hearings Before the Subcomm. on Military Operations of the House Comm. on Government Operations*, 89th Cong., 1st Sess. 44-45, 147, 513 (1965); *Competitive Problems in the Drug Industry: Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business*, 92d Cong., 1st Sess. 8018-8019 (1971).

GAO's interpretation has been presented to Congress on several occasions and fully explained in terms of the legislative history and purpose of the statutes and their construction by the courts. See, *e.g.*, *Relation of Cost Data to Military Procurement: Hearings Before the Subcomm. for Special Investigations of the House Comm. on Armed Services, supra*, at 8 ("Our experience indicates the need for careful examination into the reasonableness of accepting catalog or other established prices for negotiated procurements * * *. The fact that a product is listed in a manufacturer's catalog and offered to any customer is no assurance that competition actually is present or that the standard catalog price is reasonable"), 10-12 (discussing *Hewlett-Packard* case), 24-25 (relation between negotiation process and right of access); *Comptroller General Reports to Congress on Audit of Defense Contracts: Hearings Before the Subcomm. on Military Operations of the House Comm. on Government Operations, supra*, at 45-46 (discussing *Hewlett-Packard* case), 512 (statement on behalf of Machinery & Allied Products Institute discussing GAO's position); 115 Cong. Rec. 25801 (1969) (GAO memorandum setting forth the agency's position, accepted in *Hewlett-Packard*, that access "is not limited to that necessary to determine whether the contracts were performed in accordance with their

terms and whether the contracting officer had been defrauded or misled in entering into the contracts * * *, by what the parties may have considered or not considered in the course of negotiations * * *, [or] by the fact that the contract was performed by the delivery of 'off-the-shelf' items not specifically manufactured for the contract").

2. Cross-petitioner also contends (Pet. 13) that the access-to-records provision was enacted only for the "limited purpose of deterring or detecting abuses in the negotiation process by facilitating GAO audits of individual procurement contracts." Notwithstanding cross-petitioner's assertion, however, the access provisions are not confined to discrete audits of individual contracts in order to detect fraud and overreaching.

By their terms, the access-to-records provisions contain no limitation of the sort advanced by cross-petitioner. Rather, they apply to all government contracts negotiated pursuant to designated statutory authority. Nothing in the language of the provisions narrows their scope to unrelated audits of specific contracts or restricts their objectives to the elimination of fraud and overreaching. "Congress knew the significance and meaning of the language it employed." *Barrett* v. *United States*, 423 U.S. 212, 217 (1975).

The legislative history of the access-to-records statutes also refutes cross-petitioner's interpretation. This history has been canvassed in the government's brief in *Bristol* (80-264 Br. 15-19) and need not be repeated here. We emphasize, however, Congress' concern that "negotiated contracts * * * require close supervision and control * * *." H.R. Rep. No. 791, 82d Cong., 1st Sess. 2 (1951); S. Rep. No. 603, 82d Cong., 1st Sess. 2 (1951). Among other things, Congress feared that "aside from any intentional liberality on the part of the Government contracting officer, there is every chance in the world that the Government will come out on the short end of the deal." 97 Cong. Rec. 13198

(1951) (remarks of Rep. Hardy). See also *id.* at 13377 (remarks of Rep. Hoffman and Rep. Hardy). The debates contain repeated references to the need to determine whether prices in negotiated contracts were excessive, extravagant, or wasteful, and Congress "clearly understood * * * that there are a lot of other situations besides those involving fraud which might be uncovered" (*id.* at 13199) (remarks of Rep. Hardy). For instance, as one type of "information which would be vital in a study of a contract" (*id.* at 13376), Representative Hardy offered the following illustration:

> Another vivid example of how this authority would enable the GAO to do an effective job involves a study which my Subcommittee on Government Operations has been making on pricing practices in the procurement of automotive parts. We found one situation where the Government was buying parts from an automobile dealer who, in turn, was getting them from a parts distributor who, in turn was getting them from a small tool shop. Naturally, the price paid by the Government included profits upon profits and completely wasteful administrative and handling costs. It would be difficult, if not impossible, for GAO to detect such a situation without the right afforded in this bill.

Id. at 13198. All of these statements of congressional intent plainly extend beyond the audit of particular contracts to uncover fraud and belie cross-petitioner's constricted interpretation of the access-to-records statutes.[3]

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[3]We also note the Comptroller General's statement to Congress that "any abuses discovered by the General Accounting Office in exercising the authority contained [in the bill] promptly will be brought to the attention of the proper officials, and, if warranted, to the attention of the Congress," H.R. Rep. No. 791, *supra*, at 5; S. Rep. No. 603, *supra*, at 4. As GAO subsequently explained:

> The fact that, in final analysis, we may not be able to question the legality of particular contract transactions does not preclude our

Contrary to cross-petitioner's argument, those courts of appeals that have considered the question have held—as did the district court in this case (Pet. App. 36a-38a)—that the access-to-records provisions authorize the Comptroller General to examine a contractor's records in order to assess the reasonableness of the price charged the government and the adequacy of the protections afforded the government in negotiated procurements. See *Eli Lilly & Co.* v. *Staats, supra*, 574 F. 2d at 914-915; *Hewlett-Packard Co.* v. *United States, supra*, 385 F. 2d at 1016; *SmithKline Corp.* v. *Staats*, 668 F. 2d 201 (3d Cir. 1981). In *Eli Lilly*, the court expressly rejected the argument that the access-to-records provisions "were designed only to uncover 'improprieties in the negotiation of Government contracts,' " concluding instead "that controlling fraud was not the only purpose of the legislation and that another concern of the legislators was with excessive pricing" (574 F. 2d at 914). Similarly, the court in *Hewlett-Packard* held that the access provisions were not limited either to audits of individual contracts or to suspected fraud (385 F. 2d at 1016):

> Production costs directly pertain to that subject matter, because if out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government. While this appraisal could not affect

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reporting to the Congress and to the responsible administrative agencies that such transactions are wasteful or extravagant or that a particular contract transaction illustrates the need for an improvement in existing procurement or management procedures.

Comptroller General Reports to Congress on Audits of Defense Contracts: Hearings Before the Subcomm. on Military Operations of the House Comm. on Government Operations, 89th Cong., 1st Sess. 48 (1965) (statement of Comptroller General Campbell).

these particular contracts, it could lead to the use of other methods of meeting future procurement needs. * * *

Hewlett-Packard contends, in effect, that the sole purpose of the examination right accorded by section 2313(b) and clause 10 of these contracts, is to enable the Comptroller General to find out whether the particular contracts which give rise to the examination had been performed in accordance with their terms and whether the contracting officer had been defrauded or misled in entering into the contract.

We find nothing in the words of the statute, its legislative history, or administrative interpretation, or in the impact of other statutes, which supports this view. On the contrary, it seems to us that if such a limited scope of examination had been intended by Congress it would have found the means to so indicate. The term "contract" could have been given a restricted meaning, or the scope of the permissible examination could have been specifically limited to lines of inquiry relevant to the legality and faithful performance of the particular contract giving rise to the examination.

In the present case, the district court determined that "the survey proposed by the Comptroller * * * will facilitate supervision of the procurement process and is within his authority" (Pet. App. 38a).[4] In light of the foregoing

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[4]This determination was clearly correct and amply supported by the record. In addition, every court that has considered the purpose underlying the Comptroller General's requests to the pharmaceutical companies has agreed that, at the least, it consisted in part of the intention to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interest. See *United States* v. *Abbott Laboratories*, 597 F. 2d 672, 674 (7th Cir. 1979); *Eli Lilly & Co.* v. *Staats, supra*, 574 F. 2d at 910; *SmithKline Corp.* v. *Staats, supra*, 668 F. 2d at 207.

authorities, the court's conclusion is manifestly correct. And, since the Comptroller General's request was predicated on a proper purpose, it is immaterial whether, as cross-petitioner alleges, he was motivated by any additional purposes that, arguendo, would not be sufficient by themselves to sustain the validity of the request. See, *e.g.*, *United States* v. *LaSalle National Bank*, 437 U.S. 298, 313-317 (1978); *Mt. Healthy Board of Education* v. *Doyle*, 429 U.S. 274, 285-287 (1977).[5]

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[5]We also doubt that cross-petitioner should be heard to question the alleged additional purposes for GAO's request. The contracts at issue in this case clearly included the required record access clauses, and the Comptroller General has now invoked those provisions to seek access to records for a purpose authorized by Congress. No rule of law excuses a party from performing a contract because it does not approve of the other party's purpose in demanding performance, and petitioner should not be allowed to inquire further into the Comptroller General's motives.

Even if cross-petitioner were correct in arguing that the access-to-records provisions do not authorize a GAO research study, it would not follow that access to the records should be barred. Cross-petitioner confuses an improper motive with a motive that is perfectly legitimate but not a sufficient ground, standing alone, for access. There has been no suggestion that a research study is forbidden by law or is "improper" in any way.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

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